through rates in those States were substantially *higher* at the time of approval than Verizon's rates – and remain so today. *Id.* ¶ 68. For example, in November 2001 Verizon's flow-through rate for UNEs in Pennsylvania was 80.84 percent, as opposed to 47.84 percent in New Jersey. *Id.*[11]

Verizon's systems exhibit equally poor performance in the area of order rejections. Since August 2001, monthly rejection rates for UNE orders have exceeded 40 percent. The most recent reported rejection rate, for November 2001, was 47.23 percent – the *highest* monthly rate reported for the year to date. *Id.* ¶ 86. This rate is more than twice the current rejection rates in such States as New York, Pennsylvania, and Massachusetts. *Id.* ¶ 88. Verizon's simplistic attempt to attribute the high rejection rate (and the low flow-through rate) to "CLEC errors" is baseless, since its sole "evidence" of "CLEC errors" is a list reciting the total order volumes submitted, total order volumes rejected, and rejection rate for each individual CLEC. *See* Application at 64; McLean/Wierzbicki/Webster Decl. ¶ 70 & Att. 9; Kirchberger/Nurse/Kamal Decl. ¶¶ 89-90.

[11] Verizon asserts that its flow-through rates in New Jersey "are higher than they were in Verizon's 271-approved States at the time applications were filed in those States (and higher than the flow-through rates in those States today." Application at 63. As Verizon knows, that is incorrect. Verizon bases its assertion on the "overall" or "combined" flow-through rate for New Jersey and the other States (*i.e.*, a single flow-through rate encompassing both resale and UNE rates). Verizon's "combined rate" approach is simply an attempt to mask the fact that flow-through rates for UNEs are below those of its States where 271 applications have been approved – both at the time of approval and today. *See* Kirchberger/Nurse/Kamal Decl. ¶¶ 70-72. The level of the "combined" rate in New Jersey results from vastly higher flow-through rate for resale, and the fact that in New Jersey (unlike the other 271-approved Verizon states), resale orders constitute more than two-thirds of the orders submitted by CLECs. *Id.* ¶ 70 n.35, 75 & Att. 3. Verizon's "combined rate" approach constitutes nothing more than an assertion that as long as it satisfies its OSS obligations as to resale, it need not do so with respect to UNEs. Such a position flies in the face of the Commission's requirement that a BOC's OSS functionalities "must support each of the three modes of entry and must not favor one strategy over another." *See Michigan 271 Order* ¶ 133; *see also New York 271 Order* ¶ 85.

Verizon has also failed to provide timely and complete billing completion notices ("BCNs") to CLECs, despite the Commission's requirement that a Section 271 applicant "demonstrate that it provides competing carriers with order completion notices in a timely and accurate manner." *New York 271 Order* ¶ 187. For the last five months in which it has reported performance data, Verizon has failed to meet the BPU's benchmark for the timeliness of billing completion notices (97 percent by noon the next day after the updating of Verizon's billing systems). Kirchberger/Nurse/Kamal Decl. ¶¶ 97-98. In October 2001, Verizon's on-time rate was only 75.91 percent, which VNJ lamely attributed to a one-time "clean-up activity." *Id.* ¶ 99.

Furthermore, in many situations Verizon fails to return any BCN at all. In attempting to explain its low October 2001 rate regarding the timeliness of BCNs, Verizon disclosed that it had failed to return approximately 4,000 BCNs since January 2000. *Id.* ¶¶ 99-100. Verizon's attempt to minimize the significance of the problem – effectively suggesting that 4,000 missing BCNs are "no big deal" – ignores the Commission's own finding that "Premature, delayed or missing BCNs can cause a competitor to double bill, fail to bill or lose their customers," and thus "directly impact[] a competing carrier's ability to serve its customers at the same level of quality that [the BOC] provides to its retail customers." *Pennsylvania 271 Order* ¶ 43; *New York 271 Order* ¶ 187; Kirchberger/Nurse/Kamal Decl. ¶ 104.

Similarly, despite the Commission's recognition that inaccurate bills "can impede a competitive LEC's ability to compete in many ways," Verizon's OSS have not provided parity to CLECs in the area of billing accuracy. *See Pennsylvania 271 Order* ¶ 23. In three of the last five months for which Verizon has reported performance data, the error rate for Verizon's wholesale bills has exceeded that for its retail bills. *Id.* ¶ 108.

Finally, Verizon's data show that it has discriminated against CLECs in the provisioning of loops. For example, the average "offered" intervals and average "exceeded" intervals for "hot cuts" and 2-wire xDSL loops where no dispatch is required have been consistently longer for CLECs than for VNJ's retail operations. *Id.* ¶¶ 113-114. This disparity precludes CLECs from ensuring that the service requested by their customers will be provisioned as quickly as that requested by Verizon's retail customers – thereby impeding a CLEC's ability to compete. *Id.* ¶ 115.

In view of the problems reflected in Verizon's own reported data, Verizon has not shown that it satisfies its OSS obligations. Particularly in light of the fact that the OSS currently handle relatively low volumes of UNE transactions (and thus should easily be able to provide nondiscriminatory access),[12] parity of access cannot reasonably be found to exist when Verizon's systems reject almost 50 percent of UNE orders; when more than 50 percent of non-rejected UNE orders fall out for manual processing; when Verizon fails to provide CLECs with timely billing completion notices; when Verizon has been unable to ensure that its bills to CLECs have the same degree of accuracy as its own retail bills; and when Verizon has failed to provision loops on a nondiscriminatory basis. Verizon's "perfect score" on the KPMG test cannot mask the clear evidence that its OSS fail to meet the requirements of Section 271.

[12] The volume of UNE transactions submitted by CLECs in New Jersey is extremely low in comparison to the volumes in New York, Pennsylvania, and Massachusetts at the time the applications for those States were filed. For example, in its Carrier-to-Carrier report for November 2001, VNJ reported only 9,229 "observations" for Performance Measurement OR-3-01 (% Rejects – UNEs). (An "observation" is effectively equivalent to a customer order for the C2C metrics.) By contrast, for this same metric Verizon reported a total of 96,706 observations in New York (in September 1999), 36,946 observations in Massachusetts (in January 2001) and 103,553 observations in Pennsylvania (in June 2001). Similarly, for Performance Measurement OR-5-01 (% Flow-Through – UNEs), Verizon reported only 7,893 "observations" in New Jersey

III. VERIZON'S PERFORMANCE DATA AND THE PROPOSED PERFORMANCE INCENTIVE PLAN ARE DEMONSTRABLY INADEQUATE.

There is no factual basis for VNJ's claims that its performance data are accurate, and that the proposed New Jersey Incentive Plan ("PIP") contains a comprehensive set of self-executing remedies that will foster checklist compliance in the wake of Section 271 relief.[13] Although the Commission has never conditioned approval of a Section 271 application upon the existence of performance monitoring and enforcement mechanisms, it has recognized that such mechanisms "constitute probative evidence that the BOC will continue to meet its Section 271 obligations and that its entry would be consistent with the public interest."[14] The Commission has also made clear that, when a BOC relies on a performance monitoring and enforcement plan to support its application, it will review the contours of that plan to assess whether it provides sufficient incentives for compliance with Section 271, stating:

> Where, as here, a BOC relies on performance monitoring and enforcement mechanisms to provide assurance that it will continue to maintain market-opening performance after receiving Section 271 authorization, *we will review the mechanisms involved to ensure that they are likely to perform as promised.* While the details of such mechanisms developed at the state level may vary widely, *we believe that we should examine certain key aspects of these plans to determine whether they fall within a zone of reasonableness, and are likely to provide incentives that are sufficient to foster post-entry checklist compliance.*[15]

---

for November, as compared with 59,843 in New York, 35,031 in Massachusetts, and 91,032 in Pennsylvania during the months Verizon filed applications for those States.

[13] Guerard/Canny/DeVito Decl. ¶¶ 10, 13.

[14] *New York 271 Order* ¶ 429. *See also Massachusetts* 271 Order ¶ 236; *Kansas/Oklahoma 271 Order* ¶ 269.

[15] *New York 271 Order* ¶ 433 (emphasis added). *See also Texas 271 Order* ¶ 423; *Kansas/Oklahoma 271 Order* ¶ 273.

The Commission has identified certain key elements in a performance monitoring and enforcement plan that will buttress a showing "that markets will remain open after grant of the application."[16] Thus, in the *New York 271 Order*, the Commission found that the New York performance assurance plan would serve as an effective mechanism for ensuring future Section 271 compliance because it contained the following characteristics:

- potential liability that provides a meaningful and significant incentive to comply with the designated performance standards;
- clearly-articulated, pre-determined measures and standards, which encompass a comprehensive range of carrier-to-carrier performance;
- a reasonable structure that is designed to detect and sanction poor performance when it occurs;
- a self-executing mechanism that does not leave the door open unreasonably to litigation and appeal; and
- and reasonable assurances that the reported data is accurate.[17]

Similarly, in its subsequent decisions reviewing Section 271 applications, the Commission has evaluated each performance remedy plan at issue based upon these same characteristics.[18] VNJ's performance data and the PIP do not and cannot satisfy these criteria.

First, VNJ's performance data are inaccurate, unreliable and incomplete. Bloss/Nurse Decl. ¶¶ 12-39. VNJ has failed to implement measures properly, flouted the New Jersey BPU's directives regarding the timing and implementation of performance measures, and issued an unending stream of metrics-related change-control notices, which ultimately serve only to underscore that VNJ's performance monitoring processes are rife with error. *Id.* The fact that

[16] *New York 271 Order* ¶ 423.

[17] *New York 271 Order* ¶ 433.

many of these data omissions and errors went undetected or remained unresolved for months demonstrates that VNJ's performance reporting processes are not sufficiently mature or reliable. And, tellingly, KPMG's failure to uncover some of these problems during the metrics portion of its third party test of VNJ's OSS, in combination with the inherent limitations of that test, highlights the fragility of VNJ's claim that the metrics test is a reliable indicator of the accuracy and reliability of its performance data. *Id.* ¶¶ 38-41.

Equally disturbing is that, even after VNJ has discovered errors in its performance data, it has refused to correct and restate its performance results. Nor is any mechanism in place to insure that the problems have been corrected, that the corrective action did not impact other reporting of data, or that adequate quality assurance processes have been implemented. *Id.* ¶¶ 33-37.

Indeed, where VNJ has acknowledged that its performance results are erroneous and conceded that such errors could have a material impact on performance results, VNJ has stated explicitly that it has no obligation to reissue and restate its performance results. Bloss/Nurse Decl. ¶¶ 33-34. VNJ's wrong-headed approach renders it impossible for CLECs and this Commission to divine what VNJ's actual performance is and whether such performance warrants penalty payments. Verizon's inability to date to generate accurate, complete, and reliable performance data creates substantial uncertainty that deters competitive entry and should delay interLATA authorization.

---

[18] *See Texas 271 Order* ¶¶ 424-429; *Kansas/Oklahoma 271 Order* ¶¶ 273-278; *Massachusetts 271 Order* ¶¶ 240-247; *Connecticut 271 Order* ¶¶ 76, 77.

Second, VNJ's reliance on the PIP is premature. *Id.* ¶ 48. The PIP was proposed by the New Jersey BPU staff, and the BPU expressed its general approval of the PIP during a Board meeting on October 12. *Id.* However, during that Board meeting, the BPU staff agreed to draft additional provisions for inclusion in the PIP to address the NJ BPU's concerns that the plan include sufficient sanctions, beyond incentive credits, when performance failures impede competitive entry. *Id.* Significantly, the New Jersey BPU has not issued a final written order, and it remains unclear precisely what provisions will be included in any such final order. Not only are the final contours of the PIP unclear at this point, but its validity and enforceability remain open to challenge by Verizon. Once the final order is issued, VNJ, or any other interested party, could seek to modify or appeal the final order. Notably, when Verizon presented its draft Section 271 application for approval by the Pennsylvania PUC and relied on the approved PAP, it simultaneously challenged, in a separate proceeding, the authority of the State to impose any performance remedies. Notwithstanding VNJ's laudatory comments about the PIP in this proceeding, there is nothing to prevent VNJ from seeking modifications to the final order or challenging the authority of the New Jersey BPU once the final order goes into effect. Against this backdrop, VNJ's reliance on the PIP is premature. *Id.* ¶¶ 49-51.

Third, the proposed PIP, even if approved by the BPU and not challenged by Verizon, will not effectively deter Verizon's anti-competitive conduct once Verizon receives interLATA authorization under Section 271. *Id.* ¶ 52. To begin with, no anti-backsliding plan can be effective unless it is based upon a system of comprehensive and validated performance measurements producing accurate and reliable performance results, coupled with enforcement mechanisms that can effectively deter VNJ from engaging in anti-competitive conduct. These conditions do not presently exist in New Jersey. *Id.* ¶¶ 52-65. Because VNJ's performance results establish the point of departure against which any backsliding will be evaluated, the inaccuracies in VNJ's performance results will necessarily infect the PIP.

Equally important, Verizon has exempted itself from liability for certain key performance defects. For example, unlike in New York, where Verizon is liable if it fails to achieve total flow-through rates comparable to what Verizon itself enjoys, in New Jersey Verizon is liable only if its "achieved" flow-through rates – that is, its flow-through rates for those orders that Verizon has said should flow-through – miss the mark. This defect actually creates an incentive for Verizon *not* to improve its flow-through performance, but rather to ensure that many types of CLEC orders are never designated as eligible for electronic processing. *Id.* ¶ 54.

The PIP contains numerous other structural defects that render it an ineffective tool to deter anti-competitive conduct after any Section 271 entry. These defects include: (1) a transaction-based approach that guarantees that VNJ will incur meager penalties as a result of low order-volumes that are the result of VNJ's anti-competitive conduct; (2) a flawed statistical methodology that is skewed in VNJ's favor; and (3) an arbitrary methodology that does not appropriately handle severity of harm. *Id.* ¶ 52.

Finally, the PIP contains an overbroad force majeure clause (rejected in other jurisdictions) that creates a rebuttable presumption that VNJ's failure to comply with a performance standard is reasonable. This extraordinary clause thus operates to place the burden on CLECs to challenge VNJ's invocation of the provision. It effectively invites VNJ to violate parity standards, because such violations, if not excused altogether, serve, at worst for Verizon, only to embroil the CLECs in protracted litigation over the validity of Verizon's excuse that make a mockery of the swift, self-executing mechanisms for deterring and remedying discriminatory performance that this Commission has envisioned. *Id.* ¶¶ 65-73.

For all of these reasons, VNJ simply has not presented sufficient evidence demonstrating that its data are accurate and reliable, and that it is presently providing nondiscriminatory access. Furthermore, VNJ has not shown and cannot show that the proposed PIP is sufficiently concrete, or contains the requisite self-enforcing mechanisms, needed to deter anticompetitive conduct and assure checklist compliance post-Section 271 entry.

IV. VERIZON DOES NOT PROVIDE NONDISCRIMINATORY ACCESS TO INTERCONNECTION.

This Commission has repeatedly held that Section 251 and the Commission's implementing rules "require an incumbent LEC to allow a competitive LEC to interconnect at any technically feasible point. This means that a competitive LEC has the option to interconnect at only one technically feasible point in each LATA."[19] The Commission has further made clear that its "current rules" regarding reciprocal compensation were not "change[d]" by its ruling that incumbent LECs must afford CLECs access to single point of interconnection per LATA.[20] These current rules preclude, for example, an incumbent LEC "from charging carriers for local traffic that originates on the incumbent's network," and "require that an incumbent LEC compensate the other carrier for transport and termination for local traffic that originates on the network facilities of such other carrier."[21]

---

[19] *Texas 271 Order* ¶ 78; *see Kansas/Oklahoma 271 Order* at ¶¶ 232 & n.688.

[20] *Kansas/Oklahoma 271 Order* at ¶ 235 (citing 47 C.F.R. 51.701 et seq.).

[21] *Kansas/Oklahoma 271 Order* at ¶ 235; *see id.* citing *inter alia* (in notes 698-701) to 47 C.F.R.§ 51.701(c), (d), and (e), and to § 51.703(b).

Verizon does not comply with these rules. Verizon permits competitive LECs only to establish a single *physical* point of interconnection in each LATA. Lacouture/Ruesterholz Decl. ¶ 33. Verizon refuses, however, to treat that single point of interconnection as the relevant interconnection point for billing purposes. Instead, Verizon insists that, for purposes of determining charges for transport and reciprocal compensation, a CLEC and Verizon must establish multiple points of interconnection within each LATA, typically at Verizon end-offices or tandem switches.

Verizon's refusal to treat the CLEC's physical point of interconnection as the interconnection point for purposes of determining transport and reciprocal compensation charges conflicts with the Commission's "current rules."[22] Unlike the situation in the Kansas and Oklahoma application, where the Commission noted that the possibility of CLECs being denied access to a single point of interconnection for billing purposes was merely a "hypothetical" one,[23] here there is no question about Verizon's policy. Verizon requires CLECs to establish multiple points of interconnection per LATA for billing purposes.

Verizon relies upon this Commission's decision to approve Verizon's 271 application for Pennsylvania. There, the Commission held that Verizon complied with the obligation to provide a single physical point of interconnection per LATA, and declined to address other concerns about Verizon's interconnection policies because the "issue of allocation of financial responsibility for interconnection facilities is an open issue in our *Intercarrier*

---

[22] *Kansas/Oklahoma 271 Order* ¶ 235.

[23] *Id.* ¶ 234.

Compensation NPRM."[24] The Commission neglected to consider, however, the fact that – as the Commission expressly observed in the *Kansas/Oklahoma 271 Order* – the Commission's existing, currently applicable reciprocal compensation rules remain in force, and were not affected by the decision to require a single point of interconnection per LATA.

Indeed, there is no question but that the mere promulgation of the *Intercarrier Compensation NPRM* did not stay the application of the Commission's existing rules. It served merely to solicit comments in aid of the Commission's reconsideration of its rules. As AT&T explained at length in its comments and reply comments on the NPRM, it is crucial to the future of facilities-based entry that the Commission enforce the incumbent LEC's obligation to provide CLECs a single point of interconnection – both physical and financial – per LATA. Verizon's approach effectively eliminates the right to a single point of interconnection, for it forces a competitive LEC to pay Verizon for transport facilities and reciprocal compensation as if the CLEC were required to connect at multiple points within the LATA. It thus imposes the financial equivalent of an inefficient, non-forward-looking network architecture upon a new entrant, and creates a profound disincentive to the very facilities-based competitive entry that the Commission seeks to promote.

Nevertheless, regardless of the outcome of the *Intercarrier Compensation NPRM*, the fact remains that Verizon's 271 application for New Jersey must be evaluated against the Act and implementing rules as they currently exist. And there is no question that, under the existing rules, Verizon's refusal to honor a CLEC's single point of interconnection per LATA for

---

[24] *Pennsylvania 271 Order* ¶ 100, citing *Developing a Unified Intercarrier Compensation Regime*, CC Docket No. 01-92, Notice of Proposed Rulemaking, 16 FCC Rcd. 9610, 9634-9635, 9650-9652 ¶¶ 72, 112-114 (2001) (*"Intercarrier Compensation NPRM"*).

purposes of allocating financial responsibility for transport and termination is unlawful. Accordingly, unless and until Verizon changes its policy, Verizon cannot be found to have implemented its checklist obligations with regard to interconnection and reciprocal compensation.

V. PUBLIC INTEREST

There is a final, independent reason why the Commission should deny Verizon's application. Even if the Commission could rationally find that Verizon had fully implemented its obligations under the competitive checklist, including its duty to set cost-based rates within the range that a reasonable application of TELRIC would produce or to provide nondiscriminatory access to its operations support systems, the record here precludes any finding that granting Verizon's application is "consistent with the public interest, convenience and necessity." 47 U.S.C. § 271(d)(3(C)).

The reason is straightforward. At the heart of the public interest inquiry, as Congress conceived it and as this Commission has explained, is a determination of whether, notwithstanding checklist compliance, the local market is in fact fully open to competition. Unless the Commission can confidently make such a determination, any grant of interLATA authorization is not only premature but wholly at odds with the fundamental premise of the Act.

The first step in the public interest inquiry is therefore to assess the actual state of local competition. Here the record shows that residential competition is almost non-existent. In particular, a mere *** *** lines, or less than *** *** of the residential lines in Verizon's New Jersey service territory, are served by facilities-based competitors, and just 800 lines, again less than 1/100 of 1 percent of such lines, are served by UNE-based competitors.

The record confirms, moreover, that the absence of virtually any facilities or UNE-based residential competition is *not* the result of neutral business considerations uniquely within the control of new entrants, *Michigan 271 Order* ¶¶ 385-391, but, as explained above, is due to Verizon's anticompetitive resistance and refusal to open local residential markets in New Jersey to competitors. Accordingly, approval of this joint application is not in the public interest.

A. InterLATA Authorization Is Not In The Public Interest Unless The BOC's Local Markets Are Irreversibly Open To Competition.

As a threshold matter, Verizon "disagrees as a legal matter that the Commission may conduct any analysis of local competition in its public interest inquiry." Verizon Br. at 77 n.70. The Commission has previously considered and flatly rejected the argument once again advanced by Verizon:

> "We reject the view that our responsibility to evaluate public interest concerns is limited narrowly to assessing whether BOC entry would enhance competition in the long distance market. We believe that our inquiry must be a broader one. The overriding goals of the 1996 Act are to open all telecommunications markets to competition by removing operational, economic, and legal barriers to entry, and, ultimately, to replace government regulation of telecommunications markets with the discipline of the market.. In order to promote competition in the local exchange and exchange access markets in all states, Congress required incumbent LECs, including the BOCs, to provide access to their networks in a manner that allows new entrants to enter local telecommunications markets through a variety of methods. In adopting section 271, Congress mandated, in effect, that the Commission not lift the restrictions imposed by the MFJ on BOC provision of in-region, interLATA services, until the Commission is satisfied on the basis of an adequate factual record that the BOC has undertaken all actions necessary to assure that its local telecommunications market is, and will remain, open to competition."

Michigan 271 Order ¶ 386. *See also Massachusetts 271 Order* ¶ 233 ("we may review the local and long distance markets to ensure that there are not unusual circumstances that would make entry contrary to the public interest under the particular circumstance of this application").

Accordingly, the key question to be resolved in the public interest inquiry is whether the BOC's local markets truly "are open to competition" from new entrants. *See, e.g., Kansas/Oklahoma 271 Order* ¶ 267. Meeting the checklist requirements alone is merely a necessary, but not a sufficient, predicate to demonstrate that local markets are in fact open. Section 271(d)(3) requires an additional and independent finding that entry is in the public interest. *E.g., Michigan 271 Order* ¶ 389. The public interest test reflects Congress' recognition that, at least in some circumstances, mere satisfaction of the checklist would not be sufficient to allow local competition to develop, and that if the BOCs in those states nevertheless received long distance authority they would leverage their local monopoly into the long distance market – precisely the harm that the ban on interLATA service in section 271(a) is designed to prevent. *See Michigan 271 Order* ¶ 388 ("local telecommunications markets must *first* be open to competition so that a BOC cannot use its control over bottleneck local exchange facilities to undermine competition in the long distance market") (emphasis added).

Thus, to determine whether the BOC's local telecommunications markets are in fact open to competition, the Commission first reviews the extent to which new entrants "are actually offering" local service to both business and residential customers through each of the three means offered by the Act. *Id.* ¶ 391. Second, where local competition is not securely established, the Commission determines whether this reflects the continuing presence of entry barriers and BOC misconduct, or is attributable instead solely to the business decisions of potential new entrants.

B. Verizon Maintains Monopoly Power Over Residential Service.

The "Act contemplates three paths of entry into the local market – the construction of new networks, the use of unbundled elements of the incumbent's network, and resale" (*id.* ¶ 96). Congress "sought to ensure that all procompetitive entry strategies are available." *Id.* ¶ 387. As the Commission has recognized, its "public interest analysis of a section 271 application, consequently, *must* include an assessment of whether all procompetitive entry strategies are available to new entrants." *Id.* (emphasis added). And, as the Commission explained in the *Michigan 271 Order*, "[t]he most probative evidence that all entry strategies are available would be that new entrants *are actually offering* competitive local telecommunications services to different classes of customers (residential and business) through a variety of arrangements (that is, through resale, unbundled elements, interconnection with the incumbent's network, or some combination thereof), in different geographic regions (urban, suburban, and rural) in the relevant state, and at different scales of operation (small and large)." *Id.* ¶ 391 (emphasis added). In subsequent applications, the Commission has repeatedly considered the degree to which competitors have actually succeeded in offering local telecommunications services using the different entry strategies prescribed by the Act. *See, e.g., New York Order* ¶¶ 13-14; *Texas Order* ¶¶ 5-6.

Here, Verizon itself concedes that "the number of residential lines served by competitors in New Jersey may be lower than in other states," Verizon Br. at 82, and its own data confirm that Verizon maintains a virtual monopoly over residential service in its New Jersey service territories. Using the E911 data presented by Verizon witness William E. Taylor, Tables 1 and 2 show the amount of CLEC competition in New Jersey. The data in Table 2 shows that there is insignificant competition for residential service – a mere *** *** lines, or less than

*** *** of the residential lines in Verizon's New Jersey service territory, are served by facilities-based competitors, and only 800 lines, less than 1/100 of 1 percent of such lines, are served by UNE-based competitors.[25]

TABLE 1: Total CLEC Penetration in Verizon-NJ's Service Territory

	Quantity	Share
Verizon NJ Retail Switched Access Lines[26]	6,914,330	92.45%
CLEC Facilities-Based Lines[27]	361,000	4.83%
CLEC UNE Lines[28]	22,000	0.29%
CLEC Resale Lines[29]	182,000	2.43%
Total Lines in Verizon PA Service Territory	7,479,330	100.0%

TABLE 2: Residential Market CLEC Penetration in Verizon-NJ's Service Territory

	Quantity	Share
Verizon NJ Retail Residential Switched Access Lines[30]	4,342,831	98.70%

[25] The CLEC entry percentages in Tables 1 and 2 undoubtedly *overstate* the percentage of CLEC penetration in Verizon's New Jersey service territory. Although Verizon repeatedly trumpets the number of access lines served by CLECs in New Jersey as of October 2001, Verizon's Application contains no data concerning the number of access lines served by Verizon in New Jersey. Tables 1 and 2, rely on Commission data reflecting Verizon access line service volumes as of *December 2000*. Those numbers would clearly be far higher as of 2001 and the resulting CLEC penetration shares would be lower.

[26] FCC, Statistics of Communications Common Carriers as of December 31, 2000, at Table 2.6 (September 1, 2001).

[27] Taylor Decl. Attachment 1, Table 1.

[28] Taylor Decl. Attachment 1, Table 1.

[29] Taylor Decl. Attachment 1, Table 1.

[30] FCC, Statistics of Communications Common Carriers as of December 31, 2000, at Table 2.6 (September 1, 2001).

CLEC Residential Facilities-Based Lines[31]	*** ***	*** ***
CLEC Residential UNE Lines[32]	800	0.00%
CLEC Residential Resale Lines[33]	56,000	1.27%
Total Residential Lines in Verizon PA Service Territory	*** ***	100.0%

Moreover, even these minuscule shares present an overly optimistic picture of likely future CLEC competition in New Jersey. To begin with, as reflected in Table 3, many of the facilities-based CLECs that Verizon identifies as its competitors in New Jersey,[34] have gone, or are going, out of business or are otherwise in financial distress at the present time.

TABLE 3: Current Financial Status of Facilities-Based New Jersey CLECs Identified By Verizon[35]

NJ Facilities-Based CLEC	Change in Mkt. Cap.	Current Financial Situation
Broadview Networks		Never generated positive cash flow; laid off more than 90 employees in September 2001; withdrew IPO offer in Fall 2000.
eLEC (Essex Communications)	- 71.64%	Hearing on Nasdaq's potential delisting of stock to be held January 31, 2002; lost $4.1 million in first three quarters 2001.
Network Plus	- 95.33%	Reported 2nd Quarter $4.9 million EBITDA loss.
Adelphia Business Solutions	- 96.15%	Announced in January 2002 no dividend payments forthcoming on preferred stock following Salomon Smith Barney report that it faces "near-term restructuring or bankruptcies;" rumors of impending bankruptcy have caused stock to plunge and cut off new capital; rumors of likely acquisition by larger entity.
CoreComm (ATX Communications)	- 96.65%	Reported 3rd Quarter 2001 loss of $51 million; lost $313.8 million in 2000; Nasdaq has sought to delist stock since July 2001 and may do so in January 2002; closed Ohio office and discontinued

[31] Taylor Decl. Attachment 1, Table 1.

[32] Taylor Decl. Attachment 1, Table 1.

[33] Taylor Decl. Attachment 1, Table 1.

[34] Taylor Decl. Attachment 1 at 7-15.

[35] Table 3 is derived from Attachment 4 hereto.

		service there, eliminating 180 positions, in August 2001; eliminated 110 jobs in July 2001; cut 210 jobs in May 2001.
PaeTec		Canceled planned initial public offering in early 2001.
XO Communications	- 99.52%	Delisted by Nasdaq and erased value of public stock as part of $800 million restructuring plan to avoid bankruptcy; reported 3rd Quarter 2001 loss of $50.8 million and Standard & Poor's downgraded credit rating in November 2001; announced in October 2001 elimination of 600 jobs (8% of workforce) and reported 2nd Quarter EBITDA loss of $70.7 million; posted 1st Quarter 2001 loss of $443.5 million ($1.31 per share), cutting $2 billion from planned capital expenditures over the next five years, halting European expansion, delaying some domestic expansions, and curtailing some costly services that had limited potential.

The prospects for increased UNE-based competition are also bleak. UNE-based entry into residential service will also be impaired so long as UNE rates remain above TELRIC and above a level that would permit competitive entry. If Verizon actually offered CLECs non-discriminatory access to the full economies of scale in its existing network, the Commission should see meaningful entry by and increasing competition from UNE-based entrants. Yet, since the passage of the Act, all CLECs combined in New Jersey have managed to gain just 800 UNE-based residential lines. The microscopic level of UNE-platform-based entry in New Jersey is by degrees of magnitude smaller than the level achieved in other Verizon states in which the Commission has granted section 271 applications. As reflected in Table 4, the current level of UNE-based competition for residential service in Verizon's New Jersey service territory is *less than 1 percent* of the levels of UNE-based residential competition that existed in New York and Pennsylvania at the time the Commission considered section 271 applications for those states.

TABLE 4: NJ Versus Other States – CLEC Residential Entry Via Facilities and UNE-P

	New Jersey	NY[36]	PA[37]	MA[38]

[36] *New York 271 Order* ¶ 14.

[37] *Pennsylvania 271 Order* at n. 260; *Application of Verizon Pennsylvania Inc., et al. for Authorization To Provide In-Region, InterLATA Services in Pennsylvania,* FCC 01-269, at 52

UNE-P	800	137,342	197,000	8,050 (approx)
Facilities	*** ***	35,753	95,000	80,000 (approx)
TOTAL	*** ***	**173,095**	**292,000**	**88,050 (approx)**

Finally, resale is an inherently limited competitive vehicle, both because resale-based competitors cannot alter the nature of the service they are reselling (and thus cannot provide competitors with innovative or improved services), and because resale is priced in a manner that precludes its use in all but the most selectively chosen circumstances.[39] Not surprisingly, residential resale competition has ground to a halt in New Jersey, with fewer than 1,000 additional resold lines being served by CLECs as of June 2001 than were served a year earlier.[40] The record thus shows that resale is not a growing, viable source of future competition for Verizon in New Jersey, and that no entrant has yet succeeded in using either UNE's or facilities to offer competitive local residential service.

Indeed, it is telling that in New Jersey, UNE-P and facilities-based residential competition is dwarfed by the number of resold lines. The latter figure is not particularly large

---

(June 21, 2001); Comments of AT&T Corp., *Application of Verizon Pennsylvania Inc., et al. for Authorization To Provide In-Region, InterLATA Services in Pennsylvania*, CC Docket No. 01-138, at 71 (filed July 11, 2001) (citing to Verizon Witness Taylor, Att. 1, Exhibit B).

[38] *Application of Verizon New England Inc., et al. for Authorization to Provide In-Region, InterLATA Services in Massachusetts*, Memorandum Opinion & Order, CC Docket No. 01-09, ¶ 64 (September 22, 2000).

[39] The avoided cost discount has proved inadequate to provide CLECs a basis for profitable entry for most consumers. For example, as monopolists, the incumbents do not face (and therefore do not "avoid") the huge customer acquisition costs that CLECs confront, nor do they face the lack of economies of scale that a new entrant must address. And CLECs providing resale do not benefit from access revenue. For all of these reasons, CLECs seeking to provide a broad-based, significant competitive alternative to the incumbents' local residential monopoly cannot do so through the resale of local service.

itself, and in the other Verizon states where interLATA entry was authorized, such as New York, Pennsylvania, and Massachusetts, the number of resold residential lines was a mere fraction of the number of UNE-P and facilities-based residential lines.[41] The data on resale in New Jersey thus reinforce the central point – the local exchange market in New Jersey is uniquely devoid of any meaningful signs of actual or imminent competition.

C. The Record Demonstrates That Verizon's Local Residential Markets Remain Closed To UNE- and Facilities-Based Competition.

Because the relevant data show a lack of meaningful local competition, the Commission must next determine "whether the lack of competitive entry is due to the BOC's failure to cooperate in opening its network to competitors, the existence of barriers to entry, the business decisions of potential entrants, or some other reason." *Michigan 271 Order* ¶ 391. To make this determination, the Commission should consider all "relevant factors" that might "frustrate congressional intent that markets be open [to competition]." *Kansas/Oklahoma 271 Order* ¶ 267. A review of the evidence makes clear that entry barriers and Verizon's own actions have perpetuated Verizon's monopoly over residential service in New Jersey.

Verizon continues to discriminate against CLECs in the provision of interconnection and UNEs in ways that directly impair CLECs' ability to compete. As discussed above, Verizon has yet to demonstrate that it can provision competitive volumes of CLEC orders using its New Jersey-specific operations support systems. Relatedly, Verizon has failed to

---

[40] Verizon New Jersey Response to AT&T Data Request 97, New Jersey BPU Docket No. TO01090541, I/M/O the Consultative Report on the Application of VNJ New Jersey Inc. for FCC Authorization to Provide In-Region, InterLATA Service in New Jersey.

[41] In New Jersey, resale lines make up 98 percent of all CLEC lines. By contrast, in New York, Pennsylvania, and Massachusetts, resale lines made up only 27 percent, 6.8 percent, and 25 percent of CLEC lines respectively.

establish reliable performance measures and an effective enforcement plan, both of which are crucial to the ability and willingness of new entrants, particularly UNE-based competitors, to incur the substantial investment required to enter a BOC's local market, as well as to the continuing viability of competition once entry has occurred. *E.g., Michigan 271 Order* ¶¶ 393-94. And Verizon's refusal to provide competitors with a single point of interconnection for both operational and financial purposes greatly increases the costs of facilities-based entry, compounds the uncertainty that entrants face concerning Verizon's willingness to comply with its market-opening obligations, and further deters and delays meaningful competitive entry in New Jersey.

In addition, Verizon has further deterred competitive entry by refusing to honor its reciprocal compensation commitments in its interconnection agreement, which it is required to fulfill under sections 251 and 271 of the Act. Verizon originally persuaded the NJBPU that interconnection agreements in New Jersey should not provide for bill-and-keep accounting for local traffic, claiming that Verizon anticipated substantial imbalances in local traffic that would be more fairly compensated through reciprocal compensation. For more than four years, however, Verizon has unilaterally refused to comply with its obligation to pay reciprocal compensation for traffic imbalances that exceed a two-to-one ratio, claiming that such traffic is presumptively internet traffic for which it is not liable. Verizon's conduct flatly conflicts with its commitments under its interconnection agreement, and reflects a refusal to fully implement its reciprocal compensation obligations. Nevertheless, the NJBPU took no action on AT&T's complaint for over two years, and then, one month before the filing of this application, merely referred the issue to an Administrative Law Judge.

The combination of an incumbent LEC unwilling to honor its interconnection agreement, and a state commission unwilling promptly to act on a CLEC's attempt to compel enforcement, creates tremendous uncertainty that deters competitive entry and perpetuates Verizon's monopoly position. A market cannot be deemed irreversibly open to competition absent concrete evidence that the incumbent will in fact meet the commitments it has made to competitors through its interconnection agreements, and that the state commission will quickly and effectively enforce any attempts by the incumbent to evade those duties. Where, as here, the incumbent is able to exploit the inadequacy of the state administrative remedy to avoid, year after year, paying tens of millions of dollars to a competitor, it is premature to make any finding that such a market is fully open to competition.

Finally, the evidence here shows not only that Verizon's UNE rates in New Jersey are not TELRIC-compliant, but also that those rates are so high that they preclude efficient local entry. Specifically, those rates effect a price squeeze that prevents UNE-based competitors from earning sufficient margins to provide local service economically in competition with Verizon, by imposing wholesale costs on Verizon's competitors that render it impossible for them to offer a retail service that would be price competitive.

In the face of its own data demonstrating that residential competition is virtually non-existent in New Jersey, Verizon argues that the lack of any residential competition is "legally irrelevant" (Br. at 80), because "'[f]actors beyond the control of the BOC, such as individual competitive LEC entry strategies might explain a low residential customer base.'" Verizon Br. at 81 (quoting *Pennsylvania 271 Order* ¶ 126). However, the D.C. Circuit has recently rejected precisely this same conclusory objection, holding "the observation is no basis for rejecting a proffer of evidence that the ceiling level for UNE rates - fixed by the state commissions and approved by the FCC itself - precluded profitable entry." *Sprint Comm. Co. v. FCC*, 2001 U.S. App. LEXIS 27292 at * 13 (D.C. Cir. 2001). In its decision, the Court of Appeals remanded the *Kansas/Oklahoma 271 Order*, for the Commission to consider "whether the UNE pricing selected here *doomed* competitors to failure." *Id.* at 11 (emphasis in original).

Verizon's imposition of rates that foreclose broad-based local competition has two independent legal consequences in this proceeding. *First*, it establishes that those rates violate the checklist. Checklist item 2 requires Verizon to show that it provides UNEs "in accordance with the requirements of sections 251(c)(3) and 252(d)(1)." 47 U.S.C. § 271(c)(2)(B)(ii). Section 251(c)(3), in turn, requires UNE rates that are "just, reasonable, and *nondiscriminatory*." 47 U.S.C. § 251(c)(3) (emphasis added). The Supreme Court has held that, even if a regulated utility has charged wholesale and retail rates that otherwise fall within the permissible ranges for those rates, its wholesale rates can nonetheless fail to satisfy a nondiscrimination requirement if the utility has foreclosed retail competition by charging retail rates at the lower end of the permissible range and wholesale rates at the higher end of the permissible range. *See FPC* v. *Conway Corp.*, 425 U.S. 271, 276-282 (1976); *see also NY, NH & H R.R.Co.* v. *ICC*, 200 U.S. 361, 390-91 (1905) (railroad engages in discrimination if it sells coal at retail prices that are lower than the sum of its transportation rate, the cost of the coal, and the cost of delivering the coal from the railroad line to the retail customer). Even if the Commission were to conclude (incorrectly) that Verizon's rates satisfied TELRIC, those rates would still be discriminatory, and unlawful under Section 251(c)(3), because they foreclose competition in precisely the manner described in *Conway*.

Second, the direct evidence of a price squeeze also establishes that granting the application could not be consistent with the "public interest." 47 U.S.C. § 271(d)(3)(C). The

Supreme Court has explained that the statutory term "public interest" "take [its] meaning from the purposes of the regulatory legislation." *NAACP* v. *FPC*, 425 U.S. 662, 669 (1976). The central purpose of Section 271 is to ensure that local telephone markets in a State are open to competition – and that competing carriers therefore have the legal and economic ability to provide competing local services – before a BOC in that State is permitted to provide long-distance services. As the Commission has held, Congress adopted Section 271 in order to assure that BOCs could not provide long distance service at a time when their local monopolies would give them an "unfair advantage" over long distance competitors in, *inter alia*, providing "combined packages" of local and long distance service to customers who desire "one-stop shopping." *AT&T* v. *Ameritech*, 13 F.C.C. Rcd. 21438, ¶¶ 5, 39 (1998), *aff'd sub nom. U S WEST* v. *FCC*, 177 F.3d 1057 (D.C. Cir. 1999). If, by contrast, long-distance entry were allowed before other carriers could provide competing combined packages, it would "threaten competition" in both the local and the long-distance markets by granting the BOC a monopoly in the provision of such combined services. *Id.* ¶ 5. The Commission has thus held that the "public interest" prong of Section 271 requires it to "ensure that no other relevant factors exist that would frustrate the congressional intent that markets be open." *Kansas/Oklahoma 271 Order* ¶ 267. A price squeeze that would foreclose efficient local entry into the residential market obviously constitutes such a "relevant factor." And proof that such a factor in fact exists demonstrates conclusively that the market is not – and cannot be – open.

The Commission nonetheless had previously held that it need not consider evidence of a price squeeze in evaluating a Section 271 application. That holding was based on the Commission's view that such evidence was "irrelevant," and that considering it would improperly involve the Commission in the process of setting local retail rates that are outside its jurisdiction. *Id.* ¶ 92. But the Court of Appeals for the D.C. Circuit, relying on the Supreme Court's decision in *Conway*, has now squarely rejected that view. *Sprint* v. *FCC*, 2001 U.S. App. LEXIS 27292 (D.C. Cir. 2001). Indeed, because the central purpose of the 1996 Act is "stimulating competition," the D.C. Circuit held that the "public interest" analysis under Section 271 may weigh even "*more heavily* towards addressing potential 'price squeeze'" than was required under the Federal Power Act in *Conway*. *Id.*, at *15 (emphasis added).

Moreover, the *Sprint* Court also confirmed that the Commission's lack of jurisdiction over retail rates was no bar to such an analysis, because the Commission can respond to a price squeeze without disturbing retail rates. Instead, because the Commission has said that TELRIC rates exist within a "band," one entirely permissible solution is to "'fix[] the wholesale rates, which [a]re under its jurisdiction, at a lower level within'" that band. *Id.* at *12 (citing *Conway*, 426 U.S. at 279). Here, because, as AT&T has shown, Verizon's rates are not TELRIC-compliant to begin with, there is certainly plenty of room for downward movement.

Under *Sprint* v. *FCC*, therefore, when evidence is presented in a Section 271 proceeding that UNE-based residential competition is economically infeasible, the Commission cannot grant that application without evaluating and addressing that evidence. Unless the Commission rejects this application on other grounds, therefore, it must develop and apply a framework in this proceeding for analyzing such price squeeze claims.[42]

---

[42] In recognition of the need to develop and apply such a framework in Section 271 proceedings where such claims are made, the Commission recently asked the Court of Appeals for the D.C. Circuit to suspend briefing in the appeal of its order granting Verizon interLATA authority in Massachusetts. The Commission asked for that suspension so that it could address the price squeeze claims that had been made in that proceeding but that the Commission's order had not properly addressed. *See* FCC's Emergency Motion for Temporary Suspension of Briefing, *WorldCom* v. *FCC*, No. 09-1198 (D.C. Cir.) (filed January 7, 2002).